

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Case No. 08-60040

SANDRO CARLESIMO,

Chapter 7

Debtor.

Judge Thomas J. Tucker

OPINION SUSTAINING TRUSTEE'S OBJECTION TO EXEMPTIONS (DOCKET # 17)

This case came before the Court for hearing on January 14, 2009 on the "Trustee's Objection to Exemptions" (Docket # 17). During the hearing, and in the Order filed January 16, 2009 (Docket # 29), the Court scheduled a further hearing for February 4, 2009 at 9:00 a.m., and required the Trustee to file a transcript of the § 341 meeting by January 28, 2009. After reviewing the § 341 transcript, which the Trustee timely filed on January 28, 2009 (Docket # 30), the Court concluded that the further hearing scheduled for February 4, 2009 was not necessary, and cancelled it, by order filed February 3, 2009 (Docket # 31).

At the January 14, 2009 hearing, the Court held, and the parties agreed, that the issue presented is whether, as of the date on which Debtor filed this Chapter 7 case (August 18, 2008), the Debtor used the property located at 20470 Winston, Detroit, Michigan as a residence within the meaning of 11 U.S.C. § 522(d)(1). *See generally* 11 U.S.C. § 522(d)(1)(exemption applies, in pertinent part, to "the debtor's aggregate interest . . . in real property . . . that the debtor uses as a residence"); *In re Buick*, 237 B.R. 607, 609 (Bankr. W.D. Pa. 1999) and cases cited therein (holding that a debtor's entitlement to an exemption under § 522(d)(1) is "determined as of the filing date of . . . [a bankruptcy] petition").

The Debtor's sworn testimony at the § 341 meeting held on October 1, 2008 clearly

demonstrates, beyond any genuine dispute, and the Court finds and concludes, that as of the August 18, 2008 petition date the Debtor was *not* using the property at 20470 Winston, Detroit, Michigan as a residence. Rather, the Debtor's testimony shows that as of the petition date, and even as late as October 1, 2008, a month and one-half after the petition date, the Debtor only had an intention to use the property as his residence *at some time in the future*. But even as late as October 1, 2008, Debtor testified, he was not "yet" living at the property.

Debtor's pertinent testimony was as follows:

Q: Now, on the Windsor property, you don't live at that property, do you?
A: Not yet.
Q: What is it? Is it a home, what?
A: Yes.
Q: Okay. And who owns that property?
A: I do.
Q: Just yourself?
A: Yes.
...
MS. OVIATT: Do you intend to move into it?
THE WITNESS: Yes.

BY THE TRUSTEE:

Q: No, you're not living in now?
A: Right. (Indiscernible)
Q: What is it, a vacant house?
A: Yes.
Q: Lot? What?
A: No, it's a vacant - - vacant house.
...
Q: You have three children and your wife. Where do they live?
A: Pipers Lane.¹

¹ The Court notes that "Pipers Lane" here is a reference to 3148 Pipers Lane Court, Farmington Hills, Michigan, which is what the Debtor gave as his address earlier in the § 341 meeting (at p. 3 of the

Q: Okay. And you live there, too, don't you?
A: For right now.
Q: What, are you getting a divorce?
A: Well, eventually, yes.

(Transcript of October 1, 2008 § 341 meeting (Docket # 30), at 8-10).

There is nothing inconsistent with the Court's above findings and conclusions contained in Debtor's December 29, 2008 Affidavit (Docket # 26). For example, there is nothing in the December 29, 2008 affidavit that contradicts Debtor's earlier § 341 testimony that as October 1, 2008, Debtor was not "yet" living at the Winston property.²

Because Debtor was not using the property at 20470 Winston, Detroit, Michigan as a residence as of the petition date (August 18, 2008), he is not entitled to claim an exemption for it under 11 U.S.C. § 522(d)(1).

For these reasons, the Court will enter an order sustaining the Trustee's Objection to Exemptions.

Signed on February 4, 2009

/s/ Thomas J. Tucker

Thomas J. Tucker

United States Bankruptcy Judge

transcript, Docket # 30).

² Debtor's affidavit was executed almost three months after he gave his § 341 meeting testimony, and some four and one-half months after he filed his bankruptcy petition. Even if that affidavit had contradicted Debtor's § 341 meeting testimony, it is questionable whether the Court could disregard Debtor's earlier testimony because of a contradictory, later affidavit. *Cf. Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir. 1986)("[a] party cannot create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts her earlier deposition testimony"); *Laise v. City of Utica*, 970 F.Supp. 605, 610 (E.D. Mich. 1997)(same).